

GENDER NEUTRAL LAWS: TIME FOR A REVIEW

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ABSTRACT

The Indian legal system has been designed and implemented based on the past experiences of other independent nations after independence. At that time, the framers were fully aware of the developments globally and inculcated much of the positive aspects of numerous countries into the Constitution of India. The criminal code, i.e. the Indian Penal Code is of British origin and it continues to be the core legal foundation for substantive criminal offences. The laws reflect a gender bias. Most laws mention the term 'he', though subsequently amendments have been made to include and mean both the sexes, males and females. The society as was in existence then has changed substantially and laws also thereby need to undergo change to reflect it. Laws are essentially for the society and unless it amends itself to the changing dynamic nature of social existence, it may become redundant. In India, transgenders have been accepted and recognised as the third gender. They do not refer to themselves either as a he or a she. The LGBTQ community, the collective of sexual minorities achieved to decriminalise Section 377 which made it an offence, punishable by law to be a homosexual. In the same code, Section 375 defines rape as 'A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman'. These are the changes that have not been accommodated in the legal sphere and perhaps that makes it pertinent to review the laws, some specific ones, particularly those related to rape and sexual assault/violence, that needs to be made gender neutral. The sexual minorities are often sexually harassed and even raped but they have no legal recourse as technically only a woman can be the victim. Thus, in light of the above, the paper shall be a doctrinal study on whether there is a need to make laws gender neutral to accommodate all sexes and genders. Further, the paper shall also review the private members bill, the Criminal Law (Amendment) Bill, 2019, which was introduced by KTS Tulsi to this effect. The paper shall also dwell specifically on the terminology of rape and why it may be not be reflective of the changes in society.

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Introduction

Gender justice, gender equality are very important aspects of any civilisation. Women have fought long battles to achieve that in society. In this world, transgenders and LGBTQ members are fighting towards acceptance and recognition. With such changes in societal organisation, the law also needs to keep pace to ensure that all sections are duly accommodated and brought within the fold of legal protection. Gender neutrality is one such aspect that requires greater deliberation, particularly in relation to India. India is a conservative society that has been resistant to change. Women have worked extremely hard to make their mark in the society; however, many continue to remain in the darkness of discrimination, abuse and violence. The same behaviour is meted out for the LGBTQ community, particularly since the perceptions around them are extremely discriminatory and prejudicial in nature which has been passed on from generations. The Indian Penal Code, which is the primary code addressing and enumerating the various substantial criminal offences is of British origin. The same Code continues to be in operation which had by law, oppressed the LGBTQ community via the now repealed Section 377. Various provisions have been made in the Code that are favouring women as the Code is drafted in such a manner that perceives women as the primary victims of abuse. The Code is quite discriminatory in nature, especially when reviewed from the prism of human rights law. This paper is an attempt to address some these lacuna in the law and forward the very prominent and pertinent concept of gender neutrality to make laws, such as the Indian Penal Code, gender neutral thereby accommodates all genders without any bias.

Gender Justice And Neutrality

The idea of gender justice stems from the concept of equality. Women have been historically discriminated for ages in a society that was largely patriarchal. A historical study will reveal that women had to fight many battles within the societal framework to gain acknowledgment as equal members of society and not just family

care givers. From the surrogate movements to present day struggle of equality and harassment at workplace; women have come along way but still face challenges to the path of equality. On the other side, the society is witnessing a different wavelength of development where on section of society is comprised of women who are completely aware of their rights and demanding for the establishment of women centric society. The voices have been oscillating from one extreme to another. The concept of feminism has been largely misinterpreted as being 'male bashing' and creating a society where a woman should do everything that a man does. Thus, the idea of gender justice is more well formulated concept wherein the main focus remains that all genders, including transgenders

should be afforded the same treatment, respect, equality and benefits in society. Particularly in the workspace, all genders must be placed on an equal footing to ensure no discrimination whatsoever.

Gender equality is an idea developed around this concept though gender justice is correlated to it. With active intervention of the United Nations, human rights have become a very prominent and important tissue for all countries around the world. The United Nations has taken active steps towards acknowledging this idea of gender equality in the form of many declarations, conventions, treaties etc. with the aim to ensure that all states conform to a basic standard for a more equal society. The efforts began with the very establishment of the United Nations and the passing of the Universal Declaration of Human Rights in 1948.² Subsequently, many treaties were brought in from time to time addressing this area, including the specific convention for women, the Millennium Development Goals, etc. among others.

Taking a step further, in some issues, there is a need to be neutral to the gender of the person concerned. In such cases, the idea of gender neutrality is critical. The person should not be limited by the gender/sex but should be seen simply as a human being. A simple example of this is the criminal offence of rape.³ Rape may happen to any person, whether male, female or transgender. However, in India, it can happen only to a woman and only a male can be the perpetrator of the crime. Transgenders have

² The Universal Declaration of Human Rights, 1948

³ The Indian Penal Code, Section 375 defines rape as '*A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman*'

not yet been included in the main legal aspects of the country. Similarly, sexual harassment at workplace cannot be limited only for women as observed in case of the specific law in India. Men too are sexually exploited at workplaces; however, they have no legal recourse for it.⁴ Thus, gender neutrality is a crucial concept that needs due understanding. In all cases it is not a fight between the sexes. In some cases, the idea of gender/sex does not really matter. What matters is that the person is a human being who has suffered some form of discrimination or abuse and that should be redressed irrespective of the gender of the person concerned.

The Indian Penal Code: Gender Perspective And LGBTQ Narrative

The Indian Penal Code was drafted in 1860 by Lord Macaulay, a time when the society was largely patriarchal, and the laws were generally framed in favour of women since they were considered the weaker gender of the society. The times have changed, and India has a constitution that respects every human being fairly. Nevertheless, certain aspects of the Indian Penal Code are somewhat one-sided and have not really been adjusted to society's changing circumstances.

The area is quiet on assaults submitted by women on men or rapes on a man by a woman or a man. A man is rebuffed for assault on the off chance that he has sex with a minor young lady however the equivalent is not valid if a woman is having a sexual relationship with a minor man. It depicts men as attackers and ladies as the casualties of assaults in the nation. Additionally, when assaults on men happen it is rarely reported, and regardless of whether they are accounted for there is no extension for equity, making a sharp partition based on sex. In 2013, the Congress government passed a mandate which subbed 'rape' for 'sexual assault'. This law made the acknowledgment of male as potential victims and female as culprits however the word 'rape' as laid out in S.375 of the IPC is problematic when reviewed from this perspective. The offense of rape does not perceive men as possible victims of sexual abuse and female as possible perpetrators even today. This shows that the Indian

⁴ Economic Times-Synovate conducted a survey in which 527 people were queried across seven cities – Bangalore, Chennai, Kolkata, Mumbai Pune, Delhi, and Hyderabad – 19% said they have faced some kind of sexual harassment at office. ET Bureau, *Even men aren't safe from sexual harassment at workplace: Survey*, THE ECONOMIC TIMES, Aug. 22, 2010 (Mar. 9, 2020 11:25AM) <https://economictimes.indiatimes.com/special-report/even-men-arent-safe-from-sexual-harassment-at-workplace-survey/articleshow/6389438.cms>

legislature is still hesitant to make rape laws gender neutral in nature and therefore, utilized the expression "sexual assault" when men are victims of such abuse. In 2013, Justice Kailash Gambhir had observed that in some instances this section is exploited in a manner that is detrimental for men, particularly when out of anger, sometimes women charge rape even in cases of consensual sex, which invalidates the very point of S.375.⁵ Much the same as S.498A, this provision is defined in a manner that can be and is utilised as a weapon for most women.⁶

There is an idea in the general public that because of manly sexual orientation, men cannot be victims of rape. That is the perception and many a times, men do not come forward to report such cases owing to the societal discriminatory attitude and the shame that it will bring which will inevitably question his manliness. As the age old saying that has been perpetuated for generations, real men do not cry; similarly, this perception has been circulated for generations that a man cannot be raped.

Another facet that the code has completely left out are the LGBTQ community members, including gays, lesbians and transgenders. LGBT is an acronym which stands for "lesbian, gay, bisexual and transgender." This term is used to refer to them as a collective. While this term is increasingly being used globally, there are different terminologies used for people who form same-sex relationships and those who exhibit non-binary gender identities.⁷ There are variations of the term, including L.G.B.T.Q. and L.G.B.T.I. These in addition to the former, include the term, queer in the former and inter-sex people in the latter. The international law on the subject is based on the principles of equality and non-discrimination.⁸ Unlike other

⁵ Neerja Mishra, *Sexual Assault Against Women: Victim Friendly*, INDIAN LEGAL LIVE, Dec. 7, 2019 (Mar. 9, 2020 7:05PM) <https://www.indialegallive.com/analysis/sexual-assault-against-women-victim-friendly-77626>.

⁶ Report of Crime in India, 2012 Statistics by Ministry of Home Affairs on Section 498-A of Indian Penal Code, 1860 found that a total of 197,762 people all across India were arrested in that particular year and, only 14.4% were convicted. Report of Crime in India, 2012 Statistics by Ministry of Home Affairs, <http://ncrb.gov.in/StatPublications/CII/CII2012/Statistics2012.pdf>.

⁷ *LGBT Rights: Frequently Asked Questions*, Fact Sheet, Free and Equal, UNITED NATIONS FOR L.G.B.T.Q. EQUALITY, (Mar. 7, 2020 10:21AM) <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>

⁸ The Universal Declaration of Human Rights in art. 2, art. 2(2) of the International Covenant on Economic, Social and Cultural Rights, and art. 2(2) of the International Covenant on Civil and Political Rights cite the term, 'other status' in its articles and thus, even though sexual orientation is not mentioned explicitly, it is considered to be a part of the term. The Committee on Economic, Social and

Conventions which deal with a specific issue like women, child or torture, there is no clear instrument for the L.G.B.T.Q. community.⁹ Some of the most common forms include physical and psychological violence, rape, sexual assaults and harassment, and in some cases even killing and murders. The core of such degrading attitude stems from the well-established perceptions in the nature of homophobic and transphobic perspectives of some categories of individuals. Unfortunately, most initiatives undertaken are merely policy decisions which are non-binding in nature and thus subject to the wishes of the state.

Gay and lesbian sexual relations was a criminal offence in India till the Supreme Court finally came to the rescue and invalidated the archaic Section 377.¹⁰ Section 377 is a draconian law of the British Raj in India. This section which is enumerated under the Indian Penal Code, 1861 criminalised such relationships as being against the order of nature, referred to as 'unnatural offences' and says whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life. This law was a reflection of the mindset that existed in those days when there was lack of understanding and acceptability for the L.G.B.T.Q. community. The law which is of the 1800s is still in vogue in India as the primary law on criminal offences in India. This Code which was penned by Lord Macaulay has had amendments over time but till the decisive decision of the Hon'ble Supreme Court in the year 2018, sexual relations of the L.G.B.T.Q. community was punishable by law as an offence. On September 6, 2018, the Hon'ble Supreme Court decriminalised the Section 377 of the Indian Penal Code. However, as per the current Code, a gay man cannot be raped. Even though there are instances where gay men are sexually abused, even at times by police authorities, they cannot be raped. Similarly, a woman cannot sexually abuse a lesbian woman. Transgenders have been fighting the battle for their recognition for years now.

Cultural Rights (CESCR) has established that both are protected by the non-discrimination provision. "States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights". C.E.S.C.R., General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/20, Jun. 10, 2009. (Mar. 7, 2020 10:25AM)

<http://undocs.org/E/C.12/GC/20>. Also see, C.E.S.C.R. General Comments Nos. 14 and 15

⁹ *Id*

¹⁰ Abhishyant Kidangoor, *India's Supreme Court Decriminalizes Homosexuality in a Historic Ruling for the LGBTQ Community*, TIME, Sep. 6, 2018 (Mar. 9, 2020 8:20PM)

<https://time.com/5388231/india-decriminalizes-homosexuality-section-377/>

Though transgenders have been recognised by the Supreme Court and the Indian Parliament as being the third gender; yet there are no provisions in the IPC which accommodates their situation. A rape will never technically happen to a transgender who has not undergone gender transformative surgery. The idea of women only being the victims does not apply in this world today. There are intricate issues that need to be acknowledged by the law. It is time for the law to be reviewed in light of the present world. Laws cannot remain in history without accepting and bringing about changes in it to ensure that it applies and protects all without any discrimination of bias.

The Criminal Law (Amendment) Bill, 2019

The Criminal Law (Amendment) Bill, 2019 was introduced as a Private Members Bill by Rajya Sabha M.P. KTS Tusli on July 12, 2019.¹¹ The main focus of the Bill is to amend the Indian Penal Code to accommodate and duly acknowledge the need to be gender neutral in respect of certain offences as cited in the Code.¹² In the Statement of Objects and Reasons, the Bill states that Transgenders, including homosexuals, bisexuals and men have been specifically discriminated.¹³ The legal provisions are drafting in such a manner that they have been specifically excluded from the probability of ever being victims of sexual assault, exploitation, or abuse and most importantly rape. The Statement further reflection the societal mindset and outlook which perpetuates an idea of masochism that does not permit men to be vulnerable or be subjected to any form of abuse. This perception is one of the pertinent causes for sexual assault on women since the idea is so ingrained that men believe that they should project their masculinity in such degrading ways.

The Bill states *'to punish acts of sexual assault and rape of all persons including but not limited to men and transgender persons.'* This is pertinent and it reiterates that

¹¹ Staff Reporter, *Bill to Make Sexual Crimes Gender Neutral Introduced in Parliament by Sr Adv KTS Tulsi*, LAW STREET JOURNAL, Jul. 17, 2019 (Mar. 9, 2020 7:50PM) <https://lawstreet.co/legislative-corner/sr-adv-kts-tulsi-make-sexual-crimes-gender-neutral/>

¹² The Bill in its Preamble provides, "to further amend the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 to provide for effective protection of the Constitutional Rights of all persons vulnerable to sexual exploitation and offences, to punish acts of sexual assault and rape of all persons including but not limited to men and transgender persons in addition to the protection afforded to women under the existing penal laws and punish offenders of any sex or gender thereto"

¹³ *Id.*

this shall be in addition to the protection as already guaranteed to women. Similarly, the Bill states that offenders of any sex or gender should be subjected to punishment and one sex/gender cannot be singled out as the only perpetrators a criminal offence. The Bill refers to the Constitution of India and the Universal Declaration which espouses the principles of equality, life and liberty, prohibition of discrimination. It also refers to the 172nd Law Commission Report that has specifically mentioned the need to amend laws to make them gender neutral.¹⁴ The Bill specifies the various sections that should be amended including Sections 8, 10, 354, 375, 376 of the Indian Penal Code. Furthermore, similar changes should be made to the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872. The Bill notes that 63 nations globally have already made the necessary changes and India too should address the concept of gender neutrality in this situation.

This Bill is surely a well drafted one that addresses the concerns of gender neutrality. The Bill is attuned to the changing needs and societal organizational structure. It is a very positive legislation that had been introduced by a respected advocate of the court. However, it has not been passed yet. The reluctance of the legislators to take pro-active measures is also a reflection of the societal structure. Such changes will happen if the public perception changes towards the idea of rape and more cases are brought to the forefront of abuse across the spectrum. Men are still conflicted and feel that bringing such matters to the forefront will reduce or demean their status in society thereby questioning their perceived machoism. Though the LGBTQ has made headways in Indian society, it is still composed of many closeted people who do not feel comfortable and are often treated with hostility in Indian society. Thus, such legal provisions are critical to secure their position and ensure that some form of legal recourse is available for them to address matters of sexual exploitation, abuse or violence.

Conclusion

There is no denying that the archaic perception and ideas of the past do not apply in today's modern world. The ideas and outlook have changed and with that societal

¹⁴ Law Commission of India, One Hundred and Seventy Second Report on Review of Rape Laws, March 2000

change, law needs to change. Specifically, in relation to India, India is a comparatively conservative society and changes in the gender dynamics has happened in the recent past with more and more women raising their voices for equality. Similarly, the LGBTQ community has also been recognised in a last few years, though primarily the change has happened in the legal prism; socially, the changes are yet to be inculcated and accepted by majority of the society in India. Thus, it is imperative that India reviews its legal provisions to accommodate the changes and ensure that the law moves with the society. Both are extremely closely related, and one can help change the other. It is time that the Indian Penal Code be revised and many of its provisions be made gender neutral. Laws cannot be made only for some sections that are considered to be vulnerable, while completely excluding others from the ambit. Laws needs to be applied to all, while special provisions may be made for selected categories. However, exclusion of an entire gender may amount to discrimination and that makes implementation of laws futile. It is time India rises to the occasion and makes the amendments that are the need of the hour. The Bill, as introduced by KTS Tusli may provide a good base for bringing about the changes in the legal sphere. An equal society and equality in law and being treated equal before the law are extremely pertinent and India should not compromise on these extremely fundamental human rights safeguarded for all.